Supreme Court, U.S.
FILED
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No.

In the Supreme Court of the United States

DARRELL GUILBEAUX
Petitioner

VERSUS

GRASSO PRODUCTION MANAGEMENT, INC.,
UNION PACIFIC RESOURCES COMPANY
AND WADLEIGH INDUSTRIES INC.
Respondents

On Petition For Writ of Certiorari
To The United States Court of Appeals
for the First Circuit, State of Louisiana

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In 1984, this Court entered a decision that would have provided tort immunity by virtue of the Longshore and Harbor Worker's Compensation Act ("LHWCA") to all general contractors from suits by employees of a subcontractor. Washington Metropolitan Area Transit Authority v. Johnson, __ U.S. __, 104 S.Ct. 2827, 2835, 81 L.Ed.2d 768 (1984). In response to this decision, Congress quickly approved a bill amending the LHWCA, stating that "for purposes of this ["exclusiveness of liability"] section, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by § 904 of this Title." 33 USC 905(a). Despite clear congressional intent to overrule Washington Metro, the Fifth Circuit Court of Appeals has judicially created a "borrowed employer" defense, in direct contravention of the amendment and in spite of a contract between the general contractor and subcontractor specifically stating their intent that the subcontractor's employees be deemed independent contractors. This unwarranted activism by the Fifth Circuit ignores the express intent of Congress in passing the 1984 amendments, violates the party's right to contract, and grants complete tort immunity to a general contractor, who does not abide by employer/employee related obligations under the IRS, EEOC, OSHA and other federal statutes. The question presented is whether the Fifth Circuit has exceeded its authority in effectively overruling a congressional statute–33 USC 905(a)–that is explicit and free from ambiguity.

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

1. Darrell Guilbeaux	-	Petitioner
2. Leonard A. Radlauer	-	Petitioner's Counsel
3 UPRC	-	Defendant/Respondent
4. Wayne G. Zeringue	-	Defendant's Counsel
5. Wadleigh Industries Inc.	-	Defendant/Respondent
6. Brandt K. Enos	-	Defendant's Counsel
7. Grasso Production Management, Inc.	-	Defendant/Respondent
8. Richard A. Cozad	-	Defendant's Counsel
9. The Shaw Group, Inc.	-	Defendant/Respondent
10. Mark Latham	-	Defendant's Counsel

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DARRELL GUILBEAUX

Petitioner,

VERSUS

GRASSO PRODUCTION MANAGEMENT, INC.,
UNION PACIFIC RESOURCES COMPANY
AND WADLEIGH INDUSTRIES INC.

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
TO THE FIFTH CIRCUIT, STATE OF LOUISIANA

PETITION FOR A WRIT OF CERTIORARI

Petitioner herein respectfully prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals, Fifth Circuit, entered in this action on July 24, 2003.

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OPINIONS BELOW

Summary judgment was granted as to UPRC on February 7, 2002, finding it to be Guilbeaux's "Borrowing Employer." Wadleigh Industries, Inc. ("Wadleigh") and Grasso Production Management, Inc. ("Grasso") were granted the same relief on September 5, 2002. After appeal, the 5th Circuit affirmed per curiam on July 24, 2003, rehearing en banc denied October 8, 2003. (Appendix A-D).

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THE BASIS OF JURISDICTION

The Judgment of the United States Court of Appeals, Fifth Circuit, denying rehearing en banc in this matter was entered on October 8, 2003. This Court has jurisdiction based on 28 USC 1254.

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FEDERAL STATUTES INVOLVED

Outer Continental Shelf Lands Act 43 USC § 1333(a)(1), 1333(b)

(1) The Constitution and laws and civil and political juridiction of the United States are extended to the subsoil and seabed of the Outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be

erected hereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State:

Provided, however, that mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(b) Longshore and Harbor Workers' Compensation Act applicable; definitions

With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Act, compensation shall be payable under the provisions of the Longshore and Harbor Workers' Compensation Act [33U.S.C.A. § 901 et seq.].

33 USC 904(a)[1]

Every employer shall be liable for and shall secure the payment to his employees of the

[1] As amended in 1984.

compensation payable under sections 907, 908, 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has proved insurance for such compensation for the benefit of the subcontractor.

33 USC 905(a)[2]

(a) Employer liability; failure of employer to secure payment of compensation

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . . except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee . . . may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of

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2 As amended in 1984.

the employee. For purposes of this subsection a contractor shall be deemed the employer of subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

33 USC 901 *et seq.*

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STATEMENT OF THE CASE

1. Statement of Relevant Facts

Darryl Guilbeaux was employed by The Shaw Group, Inc. ("Shaw") aboard a fixed offshore platform owned by Union Pacific Resources Company (hereinafter "UPRC"). He suffered severe injuries while boarding the platform, and was paid compensation by his employer, The Shaw Group, Inc., who also provided medical services pursuant to the LHWCA. The platform falls under the scope of the Outer Continental Shelf Lands Act, 43 USC Section 1333(a)(1). Rights and remedies of Guilbeaux are controlled by the LHWCA, as incorporated by OCSLA and applies Louisiana law as to the damage claims. *Gulf Offshore Co. v. Mobile Oil Corp.,* 101 S.Ct. 2870, 453 U.S. 473 (1981).

On February 4, 2002, the District Court granted UPRC's motion for summary judgment, finding that Guilbeaux was a borrowed employee of UPRC as a matter of law. Later, Grasso and Wadleigh filed for summary judgment, stating their employees were also borrowed employees of UPRC, and thus, co-employees of the plaintiff. These motions were also granted. An appeal from the final judgment was taken

to the Fifth Circuit Court of Appeals, which affirmed *per-curiam.* The request for rehearing en banc was denied on October 8, 2003.

Prior to 1983, the Fifth Circuit had allowed the Borrowed Employer Doctrine to be used as a factual defense for a general contractor as to the subcontractor's employees. The line of cases was thin, and only recognized under fairly rigid rules. *Ruiz v. Shell Oil Company*, 413 F.2d 310 (5th Cir. 1969); *Gaudet v. Exxon Corp.*, 562 F.2d 251 (5th Cir. 1977). However, the entire matter of whether this judicially created doctrine was viable or not became moot in June of 1984, when this Court reversed a D.C. Circuit decision, and adopted the general contractor's argument that they enjoy LHWCA immunity from subcontractor's employees tort suits unless the contractor has neglected to secure workers compensation coverage after the sub-contractor failed to so. *Washington Metro, supra.* Under this decision, tort immunity for general contractors would have been the rule, rather than the exception.

In response to this decision, which would have effectively eliminated all personal injury suits by subcontractors against platform owners in the Gulf of Mexico, Congress approved a bill amending the LHWCA. The amendment to 33 USC 905(a) states explicitly that "for purposes of this ["exclusiveness of liability"] section, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by § 904 of this title." (Emphasis added).

The statutory language is explicit and makes functional sense. Only where an employer is liable for the compensa-

tion remedy provided by the Act is that remedy made exclusive against it for an employee's injury. It makes no sense whatsoever for Congress to have amended this statute, overruling *Washington Metro*, yet allow the general contractor to remain immune from a compensation remedy for injuries received by the subcontractor's employees and also provide complete tort immunity.

Unfortunately, in *West v. Kerr McGee,* 765 F.2d 526 (5th Cir. 1985), the Fifth Circuit planted the seed for complete judicial avoidance of Congress's instructions and intent as expressed in the 1984 Amendments. *West* was the first examination of the 1984 Amendments to 33 USC 905(a). A majority of the Court reversed the District Court's grant of summary judgment on the Borrowed Employer issue, but solely on factual grounds. Judge Tate concurred, but felt that the correct decision would have been to give literal reading to the 1984 Amendments to 33 USC 905(a) which stated "for purposes of this section, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by Section 904 of this Title." *West* at 532.

33 USC 904(a) does not legislatively authorize, approve, or provide even the most elementary grounds for the Fifth Circuit's expansive application of the Borrowed Employer Doctrine. Rather, it specifically prohibited it. However, since the plaintiff won in *West*, Judge Tate's sound reasoning was ignored and the Fifth Circuit began its inexorable march towards complete immunity for general contractors, who now have no liability for worker's compensation benefits to the subcontractor or tort liability for injuries and damage it may cause.

2. Contract Between the Parties Ignored.

The master service agreement between UPRC and Shaw, Grasso and Wadleigh states as follows:

> 14. Independent contractor. A contractor should be an independent contractor with the respect to the work and neither contractor nor any subcontractor, or their respective officers, employers or agents shall be deemed employee or servant of UPRC. Subject to the provisions of § 13(e)(2),contractor shall have complete and sole control over their respective employees and the details of the work performed and the methods by which the work is accomplished. It is understood that UPRC is interested only in the resultsa contractor obtains.

Despite the unambiguous intent of the contracting parties, the Fifth Circuit gives no credence whatsoever to the contract as it applies to the injured employee, yet gives full force and effect to every other provision in the contract. *Melancon v. Amoco Production Co.,* 834 F.2d 1238, 1244 (5th Cir. 1988). To justify this aberration, the Fifth Circuit has come up with the term "reality at the work place," which appears nowhere in 33 USC 901 *et seq*. This term of art has been judicially created to invalidate a valid contractual provision and avoid congressional intent, in order to provide complete immunity to general contractors in the Gulf of Mexico.

Courts are required to give effect to contracts according to the clear and explicit language of the contract. *Hales, Inc. v. E. I. Dupont de Nemours Company*, 24 F.3d 747, 751 (5th

Cir.). A court may not consider extrinsic evidence to determine whether a contract is ambiguous. A court may go beyond the four corners of the contract only after determining that the contract is unclear. Dept. of Transportation & Development v. Various Unnamed Owners, 661 So.2d 626, 629 (2nd Cir.). In this very case, Wadleigh sought indemnity under a contractual provision in the same contract, relying on Maloy v. Conoco, Inc., 504 So.2d 833 (La. 1987). If the judicially created "reality of the workplace" can be allowed to rescind clear contractual provisions, it could certainly allow a party to a contract to argue that in reality it had no intention of paying indemnity, regardless of what it signed. The purpose of this unprecedented judicial activism in the Fifth Circuit is to allow platform owners to hire subcontractors to do the work, not pay social security or be held responsible to the IRS, EEOC, OSHA or any other federal agency, yet be given complete tort immunity by claiming that the subcontractor's employee is its employee.

This hypocritical stance by large contractors provides untold financial benefits for them. They have total tort immunity, yet none of the responsibility. The contract between UPRC and its subcontractors is completely valid as to every provision, even Section 14, which describes its subcontractor's employees as independent contractors, with the sole exception of its use as a defense to a damage suit! All of a sudden, the horribly crippled worker is UPRC's employee! Now, UPRC is not paying any benefits, no matter what, but cannot be sued.

In this case, Guilbeaux never took any instructions from anyone at UPRC, yet was found as a matter of law to be a borrowed employee. Yet, Guilbeaux is not the most

egregious example of this hypocrisy: that title must go to Glen Jackson, who was found to be a borrowed employee of Samedan Oil Corporation, although he never met a Samedan employee. *Glen Jackson v. Samedan Oil Corporation, et al.*, 2000 WL 108880 (E.D. La. 2000). (See Opinion, Appendix E).

REASONS FOR GRANTING THE WRIT

The 1984 Amendments to 33 USC 904(a) and 905(a) were explicit and free from ambiguity. The starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intent to the contrary, the language must ordinarily be regarded as conclusive. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056 (1980). When the resolution of a question of federal law turns on a statute, we first look to the statutory language and then to the legislative history, if the statutory language is unclear. *Bloom v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 1548 (1984). There is nothing in the legislative history or the statutory language of § 905(a), as amended, that indicates any intent or rational reason why a contractor, immune under the Act for compensation remedy, should be accorded tort immunity as to the tortiously injured employee of a subcontractor, who under the Act, is liable exclusively for the compensation remedy.

The very history of the 1984 Amendment belies the Fifth Circuit's rationale behind its current grant of complete immunity to offshore platform owners. Had Congress intended that there be complete immunity to general contractors, it would have let the *Washington Metro* decision stand as the law of the land. Instead, it chose to approve an

amendment which specifically overruled *Washington Metro*, and eliminated the tort immunity of the general contractor. It is impossible to rationalize how one can state that the 1984 Amendments give substance to the development of the Borrowed Employer Doctrine at all, much less to the point where it is now applied, affording complete immunity to anyone who has anything other than a transitory presence aboard an offshore platform. A cursory examination of Fifth Circuit decisions in the last five years indicate unwavering approval of granting summary judgment on the Borrowed Employer Doctrine, always in favor of the general contractor, all in direct violation of the distinct wording of § 905(a).[3]

The platform owners cannot have it both ways. They want to be given tort immunity under the LHWCA, yet provide no employer related benefits to the person they cripple. These general contractors have no obligations to the injured employee of a subcontractor, EEOC or IRS, do not pay him or her pension benefits, and of course do not have to abide by OSHA regulations, since that applies to employers only.

This Court should give full effect to Congress's 1984 Amendments, which clearly and concisely state that the general contractor is not immune from suit for its tortious acts. To decide otherwise judicially overrules the 1984 Amendments, ignores the contract between the parties, undermines the regulations of the IRS, EEOC, OSHA and other federal statutes and, quite simply, is unfair.

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[3] As an intellectual exercise, it is interesting to compare the Court's reasoning in *Ruiz* with the current application of the Borrowed Employer Doctrine as stated in *Melancon*. The contrast is dramatic.

Respectfully yours,

_____

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APPENDIX A

FILED
FEB - 8 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DARRELL GUILBEAUX	CIVIL ACTION
versus	NO. 00-1603
COASTWIDE MARINE SERVICES, ET AL	SECTION: "F"

ORDER AND REASONS

Before the Court is defendant UPR's motion for summary judgment. For the reasons that follow, the motion is GRANTED.

I. Background

Darrell Guilbeaux was employed by the Shaw Group as a rigger/welder. On January 7, 2000, Guilbeaux and fellow Shaw employee Blaine Domingue were boarding an offshore platform owned by Union Pacific Resources in a crane/personnel basket when the basket suddenly dropped, jerking Guilbeaux's neck. Guilbeaux sued UPR and others to recover damages for his alleged injuries. Pursuant to a contract between Shaw and UPR, Guilbeaux had worked exclusively on UPR's fixed offshore platforms in one particular field for approximately one year before this incident. The contract

stated that Shaw employees working for UPR were independent contractors. Under the contract, UPR could not terminate Guilbeaux's employment with Shaw, but it could have him removed from its field and replaced with another welder. Guilbeaux reported his hours to Shaw, which then billed UPR for his services. Guilbeaux worked with Domingue, who was a fitter and supervised Guilbeaux's work. A UPR field supervisor gave Guilbeaux and Domingue their work assignments and locations, and they were typically accompanied by a third person, or "fire watch" who worked for either UPR or another company. It is unclear who provided Guilbeaux with the tools and equipment he used on the job.

UPR filed this motion for summary judgment, contending that Guilbeaux is its borrowed employee, and it is therefore immune from tort liability to him.

II. Standard for Summary Judgment

Federal Rule of Civil Procedure 56 instructs that summary judgment is proper if the record discloses no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. No genuine issue of fact exists if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party," Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The Court emphasizes that the mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. See id. Therefore, "[i]f the evidence is

merely colorable, or is not significantly probative," summary judgment is appropriate. Id. at 249-50. Summary judgment is also proper if the party opposing the motion fails to establish an essential element of his case. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). In this regard, the non-moving party must do more than simply deny the allegations raised by the moving party. Donaghey v. Ocean Drilling & Exploration Co., 974 F.2d 646, 649 (5th Cir. 1992). Rather, he must come forward with competent evidence, such as affidavits or depositions, to buttress his claims. Id. Hearsay evidence and unsworn documents do not qualify as competent opposing evidence. Martin v. John W. Stone Oil Distrib. , Inc., 819 F. 2d 547, 549) (5th Cir. 1987) . Finally, in evaluating the summary judgment, motion, the court must read the facts in the light most favorable to the non-moving party. Anderson, 477 U.S. at 255.

III. Borrowed Employee Doctrine

The borrowed employee doctrine teaches that the nominal payroll employee of one company may become the employee of another company if he is transferred to the second company with his consent and acquiescence. Hebron v. Union Oil Co. of California, 634 F.2d 245, 247 (5th Cir. 1981) . Whether a borrowed employee relationship exists is a question of law. Ruiz v. Shell Oil Co., 413 F.2d 310, 314 (5th Cir. 1969) . In Melancon v. Amoco Production Co., 834 F.2d 1238 (5th Cir. 1988), the Fifth Circuit identified nine factors for courts to examine to determine whether a person is a borrowed employee:

> (1) Who has control over the employee and the work he is performing, beyond mere suggestion of details or cooperation?

(2) Whose work is being performed?

(3) Was there an agreement, understanding, or meeting of the minds between the original and the borrowing employer?

(4) Did the employee acquiesce in the new work situation?

(5) Did the original employer terminate his relationship with the employee?

(6) Who furnished tools and place for performance?

(7) Was the new employment over a considerable length of time?

(8) Who had the right to discharge the employee?

(9) Who had the obligation to pay the employee?

Id. at 1244. No single factor is controlling, but some cases have stated that the first factor, control, is the most important. See Brown v. Union Oil Co., 984 F.2d 674, 676 (5th Cir. 1993); see also Ruiz, 413 F.2d at 310. Moreover, even if some of the factors involve a factual dispute, summary judgment is appropriate if a sufficient number of the other factors clearly satisfy the test. See Barrios v. Freeport-McMoran Resource Partners Ltd. Partnership, 1994 WL 90456, *2 (E.D.La.).

In Melancon, the plaintiff was a welder who worked on offshore platforms for Amoco under a contract between

Amoco and his employer Beraud Enterprises. An Amoco field foreman gave Melancon his work schedule and assignments, and Beraud billed Amoco for his services. Melancon, 834 F.2d at 1241-42. Melancon chose the manner in which he would complete the tasks he was assigned, and Beraud furnished most of Melancon's equipment. Id. Amoco could not terminate Melancon's employment with Beraud, but it could have him replaced with another welder on its platforms. Id. at 1242. The contract between Amoco and Beraud stated that Melancon was an independent contractor. Id. at 1242 n.5. The Fifth Circuit held that these facts satisfied the test under the borrowed employee doctrine. Id. at 1248.

The facts of the present case are strikingly similar. UPR set Guilbeaux's work schedule and gave him his assignments. In this case, however, Guilbeaux worked on a team with Domingue, who apparently also did welding work and supervised Guilbeaux's performance of UPR's assignments. Domingue and Guilbeaux received their assignments together from UPR. But the fact that Guilbeaux worked with Domingue, rather than working alone, did not diminish the level and quality of control that UPR exercised over Guilbeaux's work. UPR merely used two Shaw employees to do its work instead of one.[1] UPR's directions to Guilbeaux. and Domingue were authoritative and went beyond mere suggestion. See Ruiz, 413 F.2d at 313. Thus, UPR exercised sufficient control over Guilbeaux's work to satisfy the first Melancon factor.

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[1] The fact that Guilbeaux was a welder and UPR had no welders on its payroll does not bar a finding that he was UPR's borrowed employee. Melancon, 834 F.2d at 1245.

UPR also satisfies the second, third, and fourth factors. Guilbeaux's welding work assisted UPR in its offshore production work. UPR's business need not be welding for Guilbeaux to be its borrowed employee . Melancon, 834 F.2d at 1245. Furthermore, Guilbeaux performed UPR's work under a contract between it and Shaw. The fact that this contract stated that Shaw employees were independent contractors does not hinder a finding that Guilbeaux was UPR's borrowed employee. See id. at 1242 n.5; see also Alexander v. Chevron, U.S.A., 806 F.2d 526, 528-29 (5th Cir. 1986). Guilbeaux acquiesced in this work situation by continuing to do UPR's work in the field for approximately one year without complaining or requesting reassignment. See Melancon, 834 F.2d at 1246; see also Brown, 984 F.2d at 678; Hardin v. Conoco, Inc., 712 F.Supp. 1240 (W.D.La. 1989).

The fifth factor asks not whether Guilbeaux had any relationship at all with Shaw, but, rather, focuses on the level of control or influence Shaw had over Guilbeaux's work for UPR. See Melancon at 1246; see also Capps v. N.L. Baroid-NL Industries, 784 F.2d at 617-18. In this case, there is no evidence that Shaw had significant control beyond requiring Guilbeaux to report regularly on his time worked ... for billing purposes.

Like Amoco in Melancon, UPR furnished Guilbeaux with the place for performance of his welding duties. It is unclear from the record who provided Guilbeaux's tools. See Melancon at 1246.

UPR satisfies the seventh factor: Guilbeaux had been working for UPR for about a year at the time of the incident. See Capps, 784 F.2d at 618. UPR also had the right to

terminate Guilbeaux's services in its field, which satisfies the eighth factor. See Hebron v. Union Oil Co. of California, 634 F.2d 245 (5th Cir. 1981) . Finally, the arrangement between UPR and Shaw for Guilbeaux's payment was almost identical to the one described in Melancon, thus satisfying the ninth factor. See Melancon at 1246.

The relationship between UPR and Guilbeaux satisfies all the factors outlined in Melancon, with the possible exception of the provision of Guilbeaux's tools. Therefore, Guilbeaux was UPR's borrowed employee.

Accordingly, the motion for summary judgment is **GRANTED.**

New Orleans, Louisiana, February 7, 2002.

/S/ Martin L. C. Feldman
MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

APPENDIX B

Filed
2002 OCT 22

MINUTE ENTRY
ZAINEY, J.
October 21, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DARRELL GUILBEAUX	CIVIL ACTION
VERSUS	NO. 00-1603
COASTWIDE MARINE SERVICES, INC. ET AL	SECTION: "A"(4)

RULE 54(B) JUDGMENT

The Court granted summary judgment in favor of defendant United Pacific Resources company on February 7, 2002. The Court granted summary judgment in favor of defendants Grasso Production Management, Inc. and Wadleigh Industries, Inc. for reasons given orally from the bench on September 5, 2002.

The Court finds that no cause exists to delay the appeal of the adjudicated claims listed above. Because the remaining claims of the intervenor, The Shaw Group, as well as the cross-claims of Grasso Production Management, Inc. and Wadleigh Industries, Inc. against The Shaw Group would be Date of Entry Oct 22 2002

moot and able to be dismissed with prejudice after final appeal of the adjudicated claims, an immediate appellate review of the judgments in favor of defendants Union Pacific Resources Company, Grasso Production Management, Inc. and Wadleigh Industries, Inc. and against plaintiff, Darrell Guilbeau, dismissing plaintiff's complaint is advisable.

Accordingly,

IT IS ORDERED that there be judgment in accordance with Rule 54(b) of the Federal Rules of Civil Procedure in favor of defendants, Union Pacific Resources Company, Grasso Production Management, Inc. and Wadleigh Industries, Inc., and against plaintiff, Darrell Guilbeau, dismissing plaintiff's complaint.

New Orleans, Louisiana, this 21st day of October, 2002.

/s/ Jay C. Zainey
JAY C. ZAINEY
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DARRELL GUILBEAU	CIVIL ACTION
VERSUS	NO: 00-1603
COASTWIDE MARINE SERVICES, ET AL	SECTION: "A"

THURSDAY, SEPTEMBER 5, 2002, 8:30 A.M.
JUDGE JAY C. ZAINEY PRESIDING

COURTROOM DEPUTY: James Crull
COURT REPORTER: Vic DiGiorgio

APPEARANCES: Leonard Radlauer, Counsel for plaintiff
Richard Cozad, Counsel for defendant Grasso
Brandt Enos, Counsel for defendant Wadleigh

CIVIL MOTIONS

Deft Grasso Production's motion for summary judgment (#119) Wadleigh Ind.'s motion for summary judgment (#123) Argument.
Motions GRANTED for reasons stated on the record. Court recess at 9:00 a.m.

Date of Entry Sept 5 2002

APPENDIX C

FILED
July 24, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-31083
Summary Calendar

DARRELL GUILBEAU,
Plaintiff-Appellant,

versus

GRASSO PRODUCTION MANAGEMENT, INC.;
UNION PACIFIC RESOURCES COMPANY;
WADLEIGH INDUSTRIES, INC.,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 00-CV-1603-A

Before JONES, STEWART, and DENNIS, Circuit Judges.
PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Darrell Guilbeau appeals the summary judgment in favor of the defendants in his personal injury lawsuit brought under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et seq. He contends that this court's interpretation of the Borrowed Employee Doctrine, which the district court used to find that Union Pacific Resources Co. (Union) was immune from suit, runs counter to the legislative intent Congress's 1984 amendments to 33 U.S.C. § 904. This court has previously rejected such an argument. See West v. Kerr-McGee Corp., 765 F.2d 526, 530 (5th Cir. 1985). One panel of this court may not overrule another absent intervening en banc or Supreme Court precedent. Hogue v. Johnson, 131 F.3d 466, 491 (5th Cir. 1997).

Guilbeau also contends that the district court erred in holding that he was a borrowed employee of Union because the contract between his employer, Shaw Bagwell, and Union stated that borrowed-employee status would not arise. Parties may not contractually prevent a legal status, such as that of a "borrowed employee," from arising. See Melancon v. Amoco Prod. Co., 834 F. 2d 1238, 1245 (5th Cir. 1988). Guilbeau has not established that he was not a borrowed employee based upon the "reality at the worksite." Id. at 1244; Ruiz v. Shell Oil Co., 413 F.2d 310, 313 (5th Cir. 1969). Guilbeau's assertion that he has been denied equal protection by the district court's refusal to hold Union to this contractual provision is without merit; he has not established that he is being treated differently from any "similarly situated" individual. Mayabb v. Johnson, 168 F.3d 863, 870 (5th Cir. 1999)(citation and internal quotation marks omitted).

Guilbeau contends that the district court erred in dismissing his claims against Grasso Production Management

(Grasso) and Wadleigh Industries (Wadleigh) on the grounds that the employees of these companies that were arguably responsible for the injuries suffered by Guilbeau were also borrowed employees of Union. See 33 U.S.C. § 933(i). He maintains that these companies signed a contract with Union barring a finding of borrowed-employee status. Such a provision does not *per se* bar a finding by the courts of such a status. Melancon, 834 F.2d at 1245. As Guilbeau has not challenged the district court's finding that the "realities of the workplace" made the Grasso and Wadleigh employees "borrowed employees" of Union, any such argument is abandoned. See Brinkmann v. Dallas County Deputy Sheriff Abner, 813 F.2d 744, 748 (5th Cir. 1987).

Guilbeau has not shown that the district court erred in granting summary judgment in favor of the defendants. See Amburgey v. Corhart Refractories Corp., 936 F.2d 805, 809 (5th Cir. 1991); FED. R. CIV. P. 56. Consequently, the judgments of the district court are AFFIRMED.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-31083

Filed
Oct8 2003

DARRELL GUILBEAU
Plaintiff - Appellant

v.

GRASSO PRODUCTION MANAGEMENT INC; UNION PACIFIC RESOURCES COMPANY; WADLEIGH INDUSTRIES INC
Defendants - Appellees

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING EN BANC

(Opinion 7/24/03, 5 Cir., _____, ____ F.3d _____)

Before JONES, STEWART, and DENNIS, Circuit Judges.
PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge

in active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. App. P. and 5TH CIR. R. 3 5) , the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in f avor (FED. R. App. P. and 5TH CIR. R. 3 5) , the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ illegible
United States Circuit Judge

APPENDIX E

2000 WL 108880
(Cite as: **2000 WL 108880 (E.D.La.)**)

H Only the Westlaw citation is currently available.

United States District Court, E.D. Louisiana.

JACKSON
v.
SAMEDAN OIL CORP., et al.

No. **Civ.A. 98-0472.**

Jan. 28, 2000.

ORDER AND REASONS

VANCE, J. Page 1

*1 Defendants, Samedan Oil Corp. and Production Systems, Inc., have each moved this Court for summary judgment, seeking to dismiss all of plaintiffs claims against them. Because the Court finds that plaintiff, Glen Jackson, and his co-employee, Jimmy Bingham, were the borrowed employees of Samedan, it GRANTS defendants' motions.

I.BACKGROUND

Glen Jackson was a payroll employee of Oilfield Production Contractors, Inc. who was assigned to work as a junior lease operator for Samedan aboard oil platforms located in the Gulf of Mexico. Jackson contends that, while working on

Samedan's South Pass 47(a) platform on October 12, 1997, he sustained severe injuries to his eyes and face when a control panel caught fire. Although Samedan's wholly-owned subsidiary, Energy Development Corp., owned the SP-47 platform, Samedan provided all employees who worked on the platform pursuant to an "Employee Leasing Agreement" dated August 1, 1996. *(See* Samedan Mot. Summ. J. Ex. F.) Jackson originally brought this personal injury action only against Samedan. He amended his complaint to name additional defendants, including Production Services, Inc.. PSI employed Jimmy Bingham, the production operator working on the Samedan platform with Jackson at the time of the accident.

Both OPC and PSI are in the business of supplying workers to various oil companies, including Samedan. They supplied their employees, purportedly including Jackson and Bingham, to Samedan pursuant to "Master Work or Service Contract[s]." *(See id.* PSI Mot. Summ. J. Exs. D & E.) These contracts state that OPC and PSI shall perform as "independent contractors" and that Samedan shall not exercise control over the employees of OPC and PSI. *(See id.* Ex. D ¶ III, Ex. E ¶ III.)

With the exception of one seven-day assignment, Jackson worked exclusively on Samedan platforms during his five-month employment with OPC. *(See* id. Ex. C, Boudreaux Dep., at 134-36.) Bingham likewise worked for no employer other than Samedan for five months prior to the accident. *(See id* Ex. A, Bingham Dep., at 117.) Samedan employed Jackson and Bingham to ensure gas production from the well head into the pipeline in compliance with government regulations. Jackson and Bingham worked seven

days on/seven days off shifts on Samedan platforms. Samedan provided all food, lodging and transportation to and from the platforms. Samedan also provided Bingham with a small tool bag containing the tools he needed to perform his job. *(See id.* at 117-18.) Jackson brought his own personal tool kit, including a pipe wrench, pliers, and screwdrivers, to the Samedan platforms. *(See id* Ex. B, Jackson Dep., at 143.) However, when he needed any additional supplies or equipment, Jackson asked Samedan to send it to the platform via the supply vessel. *(See id.* at 144.)

Jackson and Bingham had worked together on Samedan's Mississippi Canyon 365 platform for a month or two before Samedan's field production foreman, Gary Ingo, sent them to work on the SP-147 platform, the day before the accident. At the time of the accident, they were the only persons on the SP-47 platform. No supervisory personnel from Samedan, OPC or PSI maintained a physical presence on the platform. Except for safety issues, Jackson and Bingham did not receive orders from Samedan regarding normal daily operations but used their own discretion in performing general maintenance work. *(See id* at 27-28.) Samedan called or sent a fax with instructions on special projects. Jackson and Bingham completed and faxed daily reports with various platform production measurements to the Samedan offices and, at the end of the week, they submitted paperwork for Samedan's review. *(See id Ex.* A, Bingham Dep., at 28-29; Ex. B, Jackson Dep., at 146, 260-61.) While stationed on the Mississippi Canyon 365 platform, Bingham conducted weekly safety meetings. *(See id.* Ex. A, Bingham Dep., at 31.) He based these meetings upon information contained in his weekly paycheck from PSI, unless Samedan provided other materials. *(See id.)*

*2 OPC and PSI issued paychecks to Jackson and Bingham based upon time sheets completed while they worked on Samedan platforms and verified by Samedan employees. *(See id* at 115-16; Ex. C, Boudreaux Dep., at 132.) While aboard the Samedan platforms, Jackson and Bingham did not receive any instructions or supervision from OPC or PSI. Bingham's only contact with PSI while assigned to Samedan concerned personal matters. (*See id.* Ex. A, Bingham Dep., at 29-30.) Jackson testified that, if he had a problem or question regarding the Samedan platform, he called Gary Ingo first. *(See id.* Ex. B, Jackson Dep., at 321.) He also occasionally called Kurt Boudreaux, OPC's operations manager, for advice as a friend when questions arose. *(See id)* Although Samedan could not terminate Jackson's or Bingham's employment with OPC or PSI, Samedan could terminate their employment aboard its platforms. *(See id* Ex. A, Bingham Dep., at 112-13; Ex. B, Jackson Dep., at 144-45.)

Samedan and PSI now move for summary judgment on the grounds that both plaintiff and Bingham are borrowed servants of Samedan and therefore plaintiffs exclusive remedy is workers compensation benefits under the LHWCA. Plaintiff argues that summary judgment is inappropriate because Samedan did not retain "authoritative direction and control" over the performance of their work. Rather, plaintiff asserts that he and Bingham were independent contractors working for OPC and PSI, respectively.

11. DISCUSSION

A. Legal Standard

Summary judgment is appropriate when there are no genuine issues as to any material facts, and the moving party is

entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552 (1986). A court must be satisfied that no reasonable trier of fact could find for the nonmoving party or, in other words, "that the evidence favoring the nonmoving party is insufficient to enable a reasonable jury to return a verdict in her favor." *Lavespere v. Niagara Mach. & Tool Works, Inc.,* 910 F.2d 167, 178 (5th Cir.1990) *(citing Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 2511 (1986)). The moving party bears the burden of establishing that there are no genuine issues of material fact.

If the dispositive issue is one for which the nonmoving party will bear the burden of proof at trial, the moving party may satisfy its burden by merely pointing out that the evidence in the record contains insufficient proof concerning an essential element of the nonmoving party's claim. *See Celotex,* 477 U.S. at 325, 106 S.Ct. at 2554; *see also Lavespere,* 910 F.2d at 178. The burden then shifts to the nonmoving party, who must, by submitting or referring to evidence, set out specific facts showing that a genuine issue exists. *See Celotex,* 477 U.S. at 324, 106 S.Ct. at 2553. The nonmovant may not rest upon the pleadings, but must identify specific facts that establish a genuine issue exists for trial. *See id* at 325, 106 S.Ct. at 2553-54; *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir.1996).

B. Borrowed Employee Doctrine

*3 The Outer Continental Shelf Lands Act, 43 U.S.C. § 1333, *et seq .,* applies to this dispute because Jackson was injured on an oil platform located on the Outer Continental

Shelf, off the Louisiana coast. *(See* First Supp. and Amend. Compl. ¶ XV. OCSLA provides that the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, regulates the right to compensation of an injured platform worker. *See* 43 U.S.C. § 1333(b). Under the LHWCA, workers' compensation is the exclusive remedy for an employee against his "employer." *See* 33 U.S.C. §§ 904(a), 905(a). The Fifth Circuit has extended this tort immunity provision to include borrowing employers under the "borrowed employee" doctrine. *See Total Marine Servs., Inc. v. Director, Office of Worker's Compensation Programs,* 87 F.3d 774, 777 (5th Cir.1996) *(citing Hebron v. Union Oil Co.,* 634 F.2d 245 (5th Cir.1981); *Gaudet v. Exxon Corp.,* 562 F.2d 351 (5th Cir.1977) *); Melancon v. Amoco Prod Co.,* 834 F.2d 1238, 1243-44 (5th Cir. 1988) (citations omitted). Workers' compensation also provides the exclusive remedy for an employee injured "by the negligence or wrong of any other person or persons in the same employ." 33 U.S.C. § 933(i). The Fifth Circuit has made clear that if two parties are the borrowed servants of the same employer, even though nominally employed by different employers, they are "persons in the same employ" for purposes of 933(i). *See Perron v. Bell Maintenance and Fabricators, Inc.,* 970 F.2d 1409, 1412 (5th Cir.1992). Accordingly, if this Court determines that Jackson was Samedan's borrowed employee, Samedan will be vested with § 933(i) immunity. Additionally, if Bingham was Samedan's borrowed employee, then Jackson and Bingham were "persons in the same employ" and the LHWCA will protect PSI from liability.

The district court determines the issue of borrowed employee status as a matter of law. *See Capps v. N.L. Baroid-NL Indus., Inc .,* 784 F.2d 615, 617 (5th Cir.1986) *(citing*

Gaudet, 562 F.2d at 357-58); *Melancon,* 834 F.2d at 1244. "[I]f sufficient basic factual ingredients are undisputed, the court may grant summary judgment." *Capps,* 784 F.2d at 616 (*citing Gaudet,* 562 F.2d at 358-59). In *Ruiz v. Shell* Oil Co., the Fifth Circuit outlined nine factors used to determine whether the borrowed employee doctrine applies. 413 F.2d 310, 312-13 (5th Cir.1969). These factors include the following:

1. Who has control over the employee and the work he is performing, beyond mere suggestion of details of cooperation?
2. Whose work is being performed?
3. Was there an agreement, understanding, or meeting of the minds between the original and the borrowing employer?
4. Did the employee acquiesce in the new work situation?
5. Did the original employer terminate his relationship with the employee?
6. Who furnished the tools and the place of performance?
7. Was the new employment over a considerable length of time?

***4** 8. Who had the right to discharge the employee?

9. Who had the obligation to pay the employee?

See id See also Melancon, 834 F.2d at 1244. Although no single factor or combination thereof is determinative, the Fifth Circuit has generally considered the factor of control to be central. *See Brown v. Union Oil Co.,* 984 F.2d 674, 676 (5th Cir.1993); *Melancon,* 834 F.2d at 1245; Capps, 834 F.2d at 1244. However, in *Gaudet,* the Fifth Circuit deemphasized the control factor and found that only the fourth, fifth, sixth, and seventh factors should be considered "essential." 562 F.2d at 356. *See Brown,* 984 F.2d at 677 n. 2.

1. Who had Control Over the Employee and the Work He was Performing

Determination of the control factor requires the Court to distinguish " 'between authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking." Ruiz, 413 F.2d at 313 *(quoting Standard Oil Co. v. Anderson,* 212 U.S. 215, 222, 29 S.Ct. 252, 254 (1909)). Plaintiff argues that the absence of any physical presence by Samedan on the SP-47 platform demonstrates that Samedan enlisted two independent contractors, not borrowed employees, to operate and maintain its platforms. The Court disagrees.

Samedan provided all platform workers who worked on SP-47 pursuant to an "Employee Leasing Agreement," in which it retained "authoritative control as to the details of the services performed by it and the Employees." *(See* Samedan Mot. Summ. J. Ex. F.) Samedan's production foreman Gary Ingo reassigned Jackson and Bingham from the Mississippi Canyon 365 platform to the SP-47 platform the day before the accident. *(See* PSI Mot. Summ. J. Ex. F, Ingo Dep., at 65-66.) Jackson's and Bingham's work as lease operator assistant and production operator entailed routine operations and maintenance to ensure that the production of gas at Samedan oil platforms complied with government regulations and met company specifications. Samedan required them to complete morning production reports on pressures, volumes, quantities and production, and Bingham faxed these reports to the Samedan offices daily. (*See* id Ex, A, Bingham Dep., at 28-29; Ex. B, Jackson Dep., at 260-61.) Samedan kept a logbook on the platform in which Bingham and Jackson recorded the daily tasks they performed to

ensure production. Although Samedan did not issue daily orders on the routine maintenance tasks, Samedan called Bingham or sent a fax with special instructions. *(See id* Ex. A, Bingham Dep., at 27.) Indeed, plaintiff testified that Gary Ingo gave Bingham some orders to follow on the day of the accident and that he and Bingham began to accomplish those tasks together. *(See id* Ex. B, . . Jackson Dep., at 87-88.) Jackson and Bingham both testified in their depositions that their work orders came from Gary Ingo or someone else at Samedan. (*See id.* Ex. A, Bingham Dep., at 119; Ex. B, Jackson Dep., at 142-44, 321.) Neither OPC nor PSI gave them any instructions concerning the work they performed on the Samedan platforms. *(See id* Ex. A, Bingham Dep., at 118-19; Ex. C, Boudreax Dep., at 136-37.) Moreover, OPC and PSI did not have any representatives on the Samedan platform to supervise or direct Jackson's or Bingham's work. There is thus no factual dispute as to who supervised Jackson's and Bingham's work on the Samedan platforms. *Compare Brown,* 984 F.2d at 678 (issue of fact on borrowed employee status When conflicting testimony regarding whether payroll employer or platform owner instructed plaintiff on how, when and where to perform his cleaning duties).

***5** That Jackson and Bingham used their own discretion in performing routine maintenance activities without daily reminders from Samedan does not preclude a finding of borrowed employee status when Samedan personnel told them "what work to do, and when and where to do it." *Melancon,* 834 F.2d at 1245. This Court does not interpret the control factor to require that the borrowed employer direct each and every action taken by the borrowed employee. Moreover, that Bingham conducted weekly safety meetings without

direct assistance from Samedan personnel does not defeat borrowedemployee status as those duties were only incidental to the central purpose of his employment, to maintain gas production from Samedan platforms. *See Moody v. Callon Petroleum Operating Co.,* 1999 WL 596268, at *3 (E.D.La. Aug. 3, 1999). After reviewing all of the relevant deposition testimony and other evidence, the Court finds that the supervision and instruction provided by Samedan rose above "mere suggestion of details or cooperation." Accordingly, the control factor weighs in favor of finding borrowed employee status as to both Jackson and Bingham.

2. Whose Work was Being Performed?

Jackson and Bingham both testified that they knew they were assigned to Samedan to further Samedan's business, the production of oil and gas. The record indicates that the maintenance and operations conducted by Jackson and Bingham did in fact promote Samedan's business. Moreover, as in Capps, OPC's and PSI's business "exist[s] solely to furnish employees to other companies so that the employee [can] perform the work of the borrowing employer." 784 F.2d at 617. Accordingly, the second factor weighs in favor of borrowed employee status.

3. Was there an Agreement or Understanding Between the Original and the Borrowing Employer?

OPC and PSI entered into apparently identical master service contracts with Samedan. These contracts provide in pertinent part:

> III. Independent Contractor Relationship
>
> It is expressly understood that [OPC/PSI] shall perform work or services hereunder as an independent contractor.

> [Samedan] shall exercise no control over [OPC's or PSI's] employees, servants, agents or representatives, ... nor the methods or means employed by [OPC/PSI] in the performance of such work or services....

(See PSI Mot. Summ. J. Exs. D & E.) Although the contracts specifically call for OPC and PSI employees to be considered independent contractors, the Fifth Circuit has held that such a contract provision does not automatically negate borrowed employee status. *See Brown*, 984 F.2d at 677-78; *Melancon,* 834 F.2d at 1245. "The reality at the work site and the parties' actions in carrying out a contract ... can impliedly modify, alter, or waive express contract provisions." *Melancon,* 834 F.2d at 1245 (citations omitted). Analyzing contract language nearly identical to that here, the *Melancon* court held that the provision did not negate borrowed employee status when the nominal employer clearly understood that plaintiff would take his instructions from the borrowed employer. *See id.* As discussed *supra*, the evidence here indicates that OPC and PSI did not instruct Jackson and Bingham how to perform their duties on the Samedan platform. Indeed, Mr. Boudreaux testified that he was not allowed to instruct Jackson on his daily operations. *(See* PSI Mot. Summ. J. Ex. C, Boudreaux Dep., at 136-37.) Like *Melancon,* Samedan told plaintiff "what work to do, and when and where to do it." 834 F.2d at 1245. The Court thus finds that the contract provision was altered by the reality at the work site, and the provision does not prohibit a finding of borrowed employee status.

4. Did the Employee Acquiesce in the New Work Situation?

***6** "The focus of this factor is whether the employee was aware of his work conditions and chose to continue working

in them." *Brown,* 984 F.2d at 678, Here, Jackson and Bingham worked on Samedan platforms for five months without lodging any complaints about their working conditions. *See Brown,* 984 F.2d at 678 (one month sufficient time to appreciate new work conditions); *Cobb v. SIPCO Servs. & Marine, Inc.,* 1997 WL 159491 (E.D.La. March 27, 1997) (Vance, J.) (two months). Indeed, Mr. Boudreaux testified that plaintiff "loved" working for Samedan. *(See* PSI Mot. Summ. J. Ex. C, Boudreaux Dep., at 58.) Moreover, Jackson and Bingham knew that their nominal employers, OPC and PSI, loaned temporary employees to other companies and that Samedan was one of those companies. *(See id* Ex. B, Jackson Dep., at 151.) These factors indicate that Jackson and Bingham acquiesced in the Samedan work arrangement and favor borrowed employee status.

5. Did the Original Employer Terminate his Relationship with the Employee?

This factor does not require the lending employer to sever completely its relationship with the employee, because such a requirement would effectively eliminate the borrowed employee doctrine. *See Melancon,* 834 F.2d at 1238; *Capps,* 784 F.2d at 617-18, Rather, the court examines the lending employer's relationship with the employee while the borrowing occurs. *See Capps,* 784 F.2d at 618. The only contact between Bingham and PSI while Bingham was on the job site consisted of phone calls regarding "personal business" and occasional meetings before he left for his shift to ensure his satisfaction with the work assignment. (*See* PSI Mot. Summ. J., Ex. A, Bingham Dep., at 29-30.) Jackson testified that he sometimes called Boudreaux at OPC "off the record" for guidance on how to perform a task on the platform, due

to Boudreaux's experience in the industry. *(See id. Ex.* B, Jackson Dep., at 319-21.) However, Jackson testified that he contacted Boudreaux only "as a buddy" and that he was obligated to call Ingo at Samedan with any *problems. (See id* at 321.) Boudreaux confirmed that OPC had no control over the daily operations at the Samedan platforms on which plaintiff worked. Based on this evidence, the Court finds that factor five weighs in favor of borrowed employee status.

6. Who Furnished the Tools and the Place of Performance?

Samedan furnished Jackson and Bingham with the place of employment, meals, lodging and transportation to and from work. Samedan also provided Bingham with the tools he needed on the job. Although Jackson furnished his own set of tools, he testified that Samedan owned the supplies and equipment located aboard the platform and that Samedan provided any additional equipment that he required. *(See* PSI Mot. Summ. J. Ex. B, Jackson Dep., at 143-44.) There is no evidence that OPC or PSI provided Jackson or Bingham with any tools needed to perform their work assignments. This factor thus favors borrowed employee status.

7. Was the New Employment Over a Considerable Length of Time?

***7** The Fifth Circuit has held that when "the length of employment is considerable, this factor supports a finding that the employee is a borrowed employee," but that "the converse is not true." *Capps*, 784 F.2d at 618. The *Capps* court found this factor neutral on borrowed employee status when the employee's injury occurred on the first day of the job. *See id.* Here, Jackson and Bingham had worked for

Samedan for approximately five months prior to the alleged accident. The Court finds that the length of employment is favorable to borrowed employee status.

8. Who Had the Right to Discharge the Employee?

While Samedan did not have the right to terminate Jackson's or Bingham's employment with OPC or PSI, it did have the right to terminate their relationship with Samedan. *(See* PSI Mot. Summ. J. Ex. A. Bingham Dep., at 112- 13; Ex. 13, Jackson Dep., at 144-45.) These facts favor borrowed employee status. *See Melancon,* 834 F.2d at 1216; *Capps,* 784 F.2d at 618.

9. Who Had the Obligation to Pay the Employee?

Finally, with respect to the last factor, OPC and PSI paid Jackson and Bingham with funds received from Samedan. Bingham sent his completed time sheets directly to Samedan while Jackson sent his time sheets to OPC and OPC then processed an invoice on his behalf to Samedan. *(See* PSI Mot. Summ. J. Ex. A, Bingham Dep., at 116; Ex. C, Boudreaux Dep., at 67-68, 132.) In both cases, Samedan verified and approved the number of hours worked on its platforms. The Fifth Circuit has consistently held that this type of payment arrangement weighs in favor of a finding of borrowed employee status. *See Melancon,* 834 F.2d at 1246; *Capps*, 784 F.2d at 618.

III. CONCLUSION

For the foregoing reasons, the Court finds no factual dipute as to the Ruiz factors and that, as a matter of law, the facts

overwhelmingly support a finding that both Jackson and Bingham were the borrowed employees of Samedan. As such, the LHWCA bars Jackson from seeking recovery against PSI or Samedan. The Court hereby GRANTS defendants' motions for summary judgment and dismisses plaintiffs claims against PSI and Samedan with prejudice.

2000 WL 108880, 2000 WL 108880 (E.D.La.)

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